Whether approved for reporting ? yes

For the Petitioner: Mr.Ashwani Pathak,Advocate.

For respondents: Mr.M.L.Brakta, Advocate.

Deepak Gupta, J.

This Criminal Revision has been filed by the complainant-Narcotics Control Bureau, Chandigarh (hereinafter referred to as the NCB) against the order of the learned Sessions Judge, Shimla dated 27.10.2005 in so far as he has rejected the prayer of the NCB for recalling two witnesses Balbir Singh and Surender Singh.

The facts necessary for disposal of the case are that the NCB filed a complaint in the Court of learned Sessions Judge, Shimla under Sections 8, 18, 20, 25, 27-A and 29 of the Narcotics Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the NDPS Act) against the accused Yuvraj Gurang and Gurusharan Sharma @ Gulshan. The allegations, in brief, are that on prior information received the NCB carried out a raid in the premises occupied by Yuvraj Gurang in the basement of Hari Bhawan at Shoghi on National High

It is further the case of the prosecution that thereafter Yuv Raj Gurang made a statement under Section 67 of the NDPC Act. In this statement he stated that he had been given 5 k.g. 'charas' and 1 k.g. of opium by Gurushran Sharma the second accused. According to this statement, this contraband had been given to Yuv Raj by Gurushran for further sale. As per this statement the accused Gurushran Sharma who was the owner of the Sharma Dhabha used to supply opium and charas to him for selling the same to the customers/drivers visiting the dhabha. The investigation also revealed that Yuvraj was working in Sharma Dhabha owned by Gurusharan Sharma for many years. The accused Gurusharan Sharma was asked to join investigation. Initially he did not do so but later on he joined the investigation at Chandigarh on 24.2.2005. According to the prosecution, Gurusharan Sharma also made a confessional statement under Section 67 of the NDPS Act which has been proved as Ext.PW-1/V/3. This confessional statement is dated 24.2.2005.

not find mention. The complainant moved an application under Section 311 of the Code of Criminal Procedure praying that it may be permitted to summon P.K. Sharma, Intelligence Officer, NCB Chandigarh, Balbir Singh and Surender Singh. The ground taken in the application was that the names of the said witnesses have inadvertently not been mentioned in the list of witnesses. It was further averred that the statement of accused Gurusharan Sharma under Section 67 of the NDPS Act had been witnessed by Surender Singh and Balbir Singh and as such they were also necessary witnesses whose names had not been cited in the list of witnesses. The learned Sessions Judge, vide the impugned order dated 27.10.2005 allowed the application in so far as it related to P.K. Sharma but dis-allowed the application for summoning Balbir Singh and Surender Singh on the ground that their parentage and address had not been disclosed. This order is under challenge before me.

statement was witnessed by two witnesses. The statement had been enclosed with the complaint. I have perused the same and find that apparently there are signatures of one Balbir Singh and one Surender Singh on the said statement Ext.PW-1/V/3. The arrest memo Ext.PW-1/V/4 and the search memo Ext.PW-1/V/5 also bear their signatures.

It is thus clear that the evidence of these witnesses is very material to corroborate the prosecution version with regard to the aforesaid documents. The documents already stand produced and proved on record but the statement of these witnesses, if they support the prosecution, will obviously corroborate the version of the complainant and give it greater strength. In my view the statement of these witnesses is essential and necessarily to be recorded to do justice between the parties.

Section 311 of the Cr.P.C. reads as follows:

"311.Power to summon material witness, or examine person present:- Any Court may, at any stage of any

proceedings under the Code summon any person as a witness if his evidence appears to it to be essential to the just decision of the case. This provision has been interpreted by the Apex court in a number of decisions. In **Mohanlal Shamji Soni vs. Union of India and another,** AIR 1991 SC 1346, the Apex Court has held as follows:

> "10. It is cardinal rule in the law of evidence that the best available evidence should be brought before the Court to prove a fact or the points in issue. But it is left either for the prosecution or for the defence to establish its respective case by adducing the best available evidence and the Court is now empowered under the provisions of the Code to compel either the prosecution or the defence to examine any particular witness or witnesses on their sides. Nonetheless if either of the parties withholds any evidence which could be produced and which, if produced, be unfavourable to the party withholding such evidence, the Court can draw a presumption under illustration (g) to Section 114 of the Evidence Act. In such a situation a question that arises for consideration is whether the presiding officer of a Court should simply sit as a mere umpire at a contest between

The Apex Court in **Rajendra Prasad vs. Narcotic Cell through its Officer-in-charge, Delhi**, AIR 1999 SC 2292, has held as follows:

> "The conventional concept is that court should not permit lacuna in prosecution evidence to be filled up. But, then what is meant by lacuna in a prosecution case has to be understood before deciding the case. A lacuna in prosecution is not to be equated with the fall out of an oversight committed by a public prosecutor during trial, either in producing relevant materials or in eliciting relevant answers from witnesses. The adage 'to err is human' is the recognition of the possibility of making mistakes to which humans are proned. A corollary of any such laches or mistakes during the conducting of a case cannot be understood as the lacuna which a Court cannot fill up. Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can be fore-closed from correcting errors. If proper evidence was not

Balbir Singh and Surender singh only on the ground that the parentage and addresses of Balbir Singh and Surender Singh were not disclosed. It may be true that the application as filed was not very happily worded and it would have been appropriate for the complainant to have given the complete names, parentage and address of the witnesses. However, for this fault of the prosecution, the evidence which is essential to decide the case could not have been shut out. The entire case against Gurusharan Sharma is based mainly on his confessional statement. This statement has been purportedly witnessed by two independent witnesses Balbir Singh and Surender Singh. In my opinion their evidence is essential to reach the truth and find out whether Gurusharan Sharma had actually made the confessional statement or not. Therefore, in my opinion the learned Sessions Judge gravely erred in rejecting the prayer of the complainant. He could have directed that the

confessional statement was actually made by Gurusharan Sharma or not.

The next argument of Mr.Brakta is that the ingredients of Section 311 Cr.P.C. are missing in the application filed by the complainant. No-doubt, the application is not very happily worded. However, from the application it is clear that these witnesses are sought to be summoned to prove the statement of Gurusharan Sharma under Section 67 of the NDPS Act. Mr.Brakta next contended that the application has been made with a purpose to fill up the lacuna in the case. The Apex Court in **Rajendra Prasad's** case (supra) has clearly held that a lacuna in prosecution is not to be equated with the over-sight committed by a Public Prosecutor during trial. In this case it is not that some gaps in the case are being filled up. The witnesses are sought to be examined to corroborate the prosecution version and to prove the documents which were filed with the complaint. No new case is being

interlocutory order. The order made on such an application can make or break the prosecution case. Therefore, this order cannot be said to be interlocutory in nature.

In view of the above discussion, I am of the opinion that the evidence of Surender Singh and Balbir Singh is necessary to reach at a just and fair decision in the case and to find out the truth. Therefore, I set-aside the order of the learned Sessions Judge, Shimla dated 27.10.2005 and permit the complainant to examine Surender Singh and Balbir Singh. The complainant shall however file the complete names, parentage and addresses of these two witnesses before the learned Sessions Judge on the next date itself. In case this is not done the prosecution shall not be entitled to examine these witnesses and its evidence shall stand closed. In case the petitioner files the complete names and addresses of these two witnesses then summons shall be issued to these witnesses for their

accused shall be given opportunity to lead evidence.

The petition is allowed in the aforesaid terms. The parties through their counsel are directed to appear before the learned Sessions Judge on 7th April, 2006. the Registry is directed to ensure that the record of the case is sent to the learned Sessions Judge, Shimla well before the next date. **Dasti copy**.

March 22, 2006 **(Deepak Gupta),**
PV **Judge**